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Supreme Court of the United States

OCTOBER TERM, 1956

No. 604

JACK RONALD CAPEHART, Petitioner

v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Supreme Court of the United States

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No.

JACK RONALD CAPEHART, Petitioner

v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the judgment of conviction of petitioner by the United States District Court for the Northern District of West Virginia for a violation of the Universal Military Training and Service Act.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, p. 26, *infra*) is not yet reported. The opinion of the District Court is reported (141 F. Supp. 708). [R. 85-106]

JURISDICTION

The judgment of the Court of Appeals was entered in this case on October 9, 1956. (See Appendix B, *infra*, page

31.) By order of the Court of Appeals time for filing a petition for rehearing was extended to October 26, 1956. A petition for rehearing was filed on October 22, 1956. It was denied on October 31, 1956. (See Appendix C, *infra*, page 32.) The time for filing this petition for writ of certiorari expires November 30, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1). (See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.) The District Court had jurisdiction under 18 U. S. C. § 3231.

QUESTIONS PRESENTED

I.

Since the definition of the term minister of religion appearing in the act and the regulations does not hinge the exemption from service upon whether the minister is paid for his ministerial services, did the local board deny the petitioner procedural due process of law or a full and fair hearing upon his personal appearance by holding that he was not entitled to the exemption because he was not paid a salary for his ministerial services?

II.

Since the regulations deny the help of legal counsel before the local board but guarantee, in lieu thereof, assistance to registrants by local board advisors, did the local board deny petitioner procedural due process of law and invalidate the order to report for civilian work by not informing petitioner of the right of assistance by advisors through posting the names of advisors to registrants conspicuously in the local board office as required by Section 1604.41 of the Selective Service Regulations?

III.

Since the denial of a full and fair hearing on personal appearance and the right to have assistance of advisors to registrants are not rights that can be exercised before

the appeal board, did the courts below commit reversible error in holding that the *de novo* classification by the appeal board cured the denial of such procedural rights by the local board?

STATUTE INVOLVED

Section 16 (g) (1), (2) and (3) of the Universal Military Training and Service Act prescribes the definition of a minister:

> "The term 'duly ordained minister of religion' means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.
>
> "(2) The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.
>
> "(3) The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a min-

ister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."—50 U. S. C. § 466(g)(1), (2) and (3), 62 Stat. 624.

SELECTIVE SERVICE REGULATIONS INVOLVED

Section 1604.41 of the Selective Service Regulations (32 C. F. R. § 1604.41) reads:

> "Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office."

Section 1622.43 of the Selective Service Regulations (32 C. F. R. § 1622.43) reads in part as follows:

> "1622.43 Class IV-D; Minister of Religion or Divinity Student.—(a) In Class IV-D shall be placed any registrant:
>
> "(1) Who is a regular minister of religion;
>
> "(2) Who is a duly ordained minister of religion; . . ."

STATEMENT OF THE CASE

The indictment in the District Court for the Northern District of West Virginia charged that the petitioner did "knowingly and wilfully fail, neglect and refuse to perform such civilian work of national importance" at the Weston State Hospital, Weston, West Virginia, as ordered by his local board. [R. 3-4] The petitioner was tried to the court without a jury and convicted of violating the act, as alleged. [R. 2, 103] The reasons for conviction were stated by the district judge in an opinion. [R. 85-106] The case was appealed and the judgment of conviction was affirmed for reasons stated in the opinion, Appendix A, *infra*, pp. 26-30.

Jack Ronald Capehart was born on July 17, 1928. [R. 53] He registered under the Selective Service System on September 14, 1948. [R. 11] In his Selective Service classification questionnaire the petitioner stated that he was a minister of religion, that he regularly served as a minister and that he had been a minister of Jehovah's Witnesses since August 24, 1940, and that he has been formally ordained. [R. 53] He follows the ministry work as his prime vocation, and secular work is just to keep him in the ministry. [R. 17] While his case was before the Selective Service boards he averaged around 100 hours each month in the ministerial work. [R. 55] Since September 1, 1949, he has been putting 40 hours per week in secular employment as a stenographer-clerk. [R. 17-18] At the time of his trial he was the presiding minister of the Huntington East Unit Congregation of Jehovah's Witnesses and also was Supervising Minister over two congregations in Huntington, West Virginia. [R. 11]

With his classification questionnaire he filed a certificate signed by 27 persons that he was an ordained minister of the gospel and that he regularly and customarily preached and taught the word of God as set forth in the Bible. [R. 56] A certificate issued by the Watch Tower and Tract Society states that he is an ordained minister of Jehovah God to preach the gospel of God's Kingdom under Christ Jesus and that he is one of Jehovah's Witnesses. [R. 56-57]

At the time the petitioner filed his classification questionnaire in May of 1949, he had worked at his secular employment for 3½ years and indicated that he did not expect to remain so employed but expected to enter the full-time ministry [Gov. App. 1a].[1]

He filed a special form for conscientious objector, Form No. 150. [R. 59-60] He answered Series IV, question 2 (d), which states: "Give the name, title and present address of the pastor or leader of such church, congregation, or meeting." In answer thereto, he inserted the name of Kenneth B. Reed with the title of Company Servant, Huntington Company of Jehovah's Witnesses. [Gov. App. 2a]

The petitioner in the supplementary information sheet submitted by him to the local board on October 16, 1951, in which he listed his present occupation as a stenographer-clerk with the Chesapeake and Ohio Railway Company at a monthly pay of $275.00 and further stated "Also Ordained Minister note: I spend evenings and weekends in ministry work." [Gov. App. 2a]

On May 24, 1949, the local board placed petitioner in Class IV-E as a conscientious objector. [R. 58] On June 1, 1949, the petitioner wrote to his local board, "while I am a conscientious objector to personal participation in war, I am first of all a minister of the gospel and entitled to a 4-D classification. The fact that it is necessary for me to engage in secular work to provide the necessities of life does not argue against the fact that I am a minister." [R. 62] He also informed the local board, "as I have previously stated in my letter to you of May 15, 1949, I average around 100 hours each month in the ministerial work. During this period of time I preach to approximately 125 to 150 persons individually. This is perhaps a greater number of persons preached to than are found in the congregations of many ministers who do no secular work but who burden their congregations with the responsibility of providing for their material needs." [R. 62]

[1] Gov. App. refers to Government Appendix in the court below.

In the letter of June 1, 1949 he also appealed his 4-E classification as a conscientious objector to the Appeal Board. [R. 63] On October 24, 1949 the appeal board continued the registrant in Class IV-E as a conscientious objector by a vote of 3 to 0. [R. 58] On March 7, 1951, petitioner's classification was changed from that of IV-E to III-A by the local board. [R. 58] On October 1, 1951, the local board reclassified him, placing him in Class I-O. This was a new designation for a conscientious objector. [R. 58] On October 16, 1951, a certificate was issued by Eugene H. Moore, connected with the Huntington, West Virginia, Congregation of Jehovah's Witnesses which certified that Jack Ronald Capehart is recognized by the Watchtower Bible and Tract Society as an ordained minister of the gospel. [R. 63] An affidavit of Clarence A. Pouch states the ministerial qualification of petitioner. [R. 64] Under date of October 16, 1951, petitioner requested the local board to change his classification to that of a minister. [R. 65-69]

The local board granted petitioner a personal appearance. [R. 58] On October 29, 1951, Capehart had a personal appearance before the members of his local board. The relevant parts of what took place at the hearing are established by the uncontradicted evidence of the petitioner. [R. 11-14] The local board made a memorandum or summary of the hearing. The document appearing in the draft board file reads as follows:

"SELECTIVE SERVICE SYSTEM

October 29, 1951

"I certify that JACK RONALD CAPEHART, #46-2-28-455, made a personal appearance before the members of this Board on the above date and asked that he be given a minister's classification of 4-D. The Board inquired if he had a church of his own in which he preached, he replied, he did not, but did other kind of work, such as passing out literature on the street and teaching.

"He then was asked, how many ministers they had in his church. He replied, he did not know, that all of them were ministers of the Gospel. The Board told him that they considered a Deacon or Elder in a Baptist, Methodist, or Presbyterian Church as doing that kind of work, and if they gave all of Jehovah's Witnesses a 4-D classification they would feel they should give all Deacons and Elders the same classification.

"Mr. Capehart asked to read some of the Supreme Court Decisions on the appeal cases of Jehovah's Witnesses, but Mr. Keadle, a Board Member, told him he would be glad to sit and talk to him all day, but other registrants were waiting to make personal appearances. He was advised, however, that he had the right of appeal and they would leave further decision to them.

"Mr. Capehart was of the opinion this board was prejudiced against Jehovah's Witnesses. The board informed him they were not prejudiced, but according to their interpretation of the Selective Service Laws, a 4-D classification was for a minister who preached for a church or congregation as their minister and received pay for his services, or one who was in a recognized school, preparing for the ministry. According to the information in Mr. Capehart's file, he works for the C. & O. Railway Company as Stenographer-Clerk at a salary of $275.00 per month.

"When he was informed that he had the right of appeal, he stated he would appeal, that he would never go into the service or into work contributing to the war. He also stated he would take his case to the higher courts who were not prejudiced against Jehovah's Witnesses and who had never decided a case against them.

"(s) ZENA K. HARDWICK, Clerk

Zena K. Hardwick, Clerk
Local Board #2
Huntington, W. Va."
[R. 69-70]

The chairman of the local board, Charles L. Cavendish, testified the board had not adopted any policy which would rule a man ineligible for a ministerial classification because he is one of Jehovah's Witnesses. [R. 39]

The local board clerk testified that petitioner was denied the right to read various court decisions because a board member advised him the board didn't have time to go into court decisions. [R. 34]

On October 16, 1951, prior to his appearance before the local board the petitioner wrote a lengthy letter to the board in which he cited regulations and court decisions. [R. 66, 105] On November 5, 1951, subsequent to his personal appearance, in appealing the local board classification, he wrote a lengthy letter wherein he cited the several judicial decisions and Opinion No. 14 of the Director of Selective Service which were the same that he attempted to read to the local board at the time of his personal appearance [Gov. App. 3a through 13a]

When questioned by the trial judge witness Reed testified about his experience before the same local board: "Well, myself, because of my first personal appearance that I had before the Board I was denied the right to say what I was willing to say, too, before the Local Board; in fact, at my first personal appearance Mr. Cavandish, a member of the Board, when my case was introduced, he said, 'I won't even consider your case.' and got up and left the room." [R. 29] This testimony was uncontradicted.

The petitioner at the time of the personal appearance saw no list of advisors to registrants posted. Several years later he checked on the failure to post the names and addresses to the advisors to the registrants and found no such names posted. [R. 12-13] Petitioner testified that he needed the help of an advisor to the registrants and was harmed on account of no advisor being on hand and knowing no way to obtain advice. [R. 12-13]

A witness for petitioner testified that he went to the office of the local board and found no names of advisors to the

registrants conspicuously posted on the walls of the local board. The witness, Reed, testified that there were no names and addresses of advisors posted in the office of the local board at the time of his personal appearance on February 15, 1951, or at the subsequent times that he visited the local board's office. [R. 27-29]

After the personal appearance of petitioner before his local board on October 29, 1951, he was continued in class I-O by a vote of 3-0. [R. 58] Thereafter on November 7, 1951, the local board received a letter from the petitioner appealing his classification to the appeal board. Thereafter, on December 7, 1951, his classification was continued in class I-O by the appeal board. On February 18, 1952, the Selective Service file was sent to the state headquarters for review. Thereafter on June 25, 1952, a Presidential Appeal Board continued the classification of petitioner in class I-O. [R. 58] Thereafter, on August 31, 1953, upon orders by the local board, petitioner refused to perform civilian work at Weston State Hospital, Weston, West Virginia, for which cause the prosecution was had. [R. 58-59]

The district court, in finding petitioner guilty held that he had fallen short of establishing that he should have been classified a minister. The court found that petitioner's religious work did not comprise his "vocation." [R. 103] The court pointed out the relevant background factors [R. 104] that the conscientious objector classification was approved by both the state appeal board and the presidential appeal board [R. 104] and that the action of the appeal board completely superseded the action of the local board. [R. 104] The court thus concluded that any allegation of prejudice is not relevant. [R. 105] Further he found that the local board had all information before it and the same information was in the Selective Service file when the case was reviewed on appeal. [R. 106] Judge Boreman also found as a fact that although the names of advisors were not posted on the wall of the office of the local board, advisors had

been appointed and a list of such advisors was available and on the desk of the clerk. [R. 105]

The Court of Appeals held that the failure to follow the definition of the term "minister of religion" by the local board in considering the case was not such "error of law as would vitiate the proceedings as in the case of *Sicurella* v. *United States,* 348 U. S. 385." That court also held that the other denials of procedural due process by the local board "were rendered innocuous by the subsequent classifications by the appeals board."—Appendix A, *infra,* p. 29.

REASONS FOR GRANTING THE WRIT

I.

The holding of the court below, that the reclassification by the appeal board cured the denial of procedural due process by the local board in (a) defying the definition of the term "minister of religion" and (b) failing to post the names and addresses of advisors to registrants, is in direct conflict with *Mintz* v. *Howlett,* 207 F. 2d 758 (2d Cir. 1953); *Knox* v. *United States,* 200 F. 2d 398 (9th Cir. 1952); *Franks* v. *United States,* 216 F. 2d 266 (9th Cir. 1954); and *United States* v. *Zieber,* 161 F. 2d 90 (3rd Cir. 1947). This conflict of circuits on the question involved is one which should be resolved in the interests of orderly administration of the selective service laws in this field of criminal law. In addition the question is important for future cases of the same type which may arise. Every selective service case that arises under the act, where the registrant has exhausted his administrative remedies by appeal, and which involves a denial of procedural due process by the local board, presents the question. With the large number of cases constantly presenting the question this Court should grant the writ and determine the question.

II.

The holding, that the denial of procedural due process by the local board in holding that petitioner was not entitled to exemption because he received no salary for his ministerial work was not a serious denial of a full and fair hearing and was cured by the *de novo* classification by the appeal board, is in conflict with *Niznik* v. *United States,* 184 F. 2d 972 (6th Cir. 1950); and *Shepherd* v. *United States,* 217 F. 2d 942 (9th Cir. 1954). The holding is also out of harmony with the holding of this Court in *Sicurella* v. *United States,* 348 U. S. 385 (1955). For these reasons the writ should be granted and the question settled by this Court. The question is important because the rights of thousands of unpaid ministers under the law whose vocation is the ministry and who are entitled to the exemption by the act according to *Dickinson* v. *United States,* 346 U. S. 389 (1953), are imperiled under this holding which approve the importation of the foreign element of pay for the ministry into the statute contrary to the intent of Congress.

The court below erroneously concluded that the petitioner was complaining of the arbitrariness of the classification, which was not a point raised in the brief, and thereby overlooked completely the point that there was a denial of procedural due process of law upon the personal appearance when the board proceeded upon the wrong theory of law and imported foreign standards into the congressional definition of what constitutes a minister of religion.

It is significant that the court below nowhere in its opinion states or refers to the third of the three points for reversal appearing in the brief for the petitioner.

Nowhere in the brief filed in the court below did petitioner complain about the denial of the ministerial classification being without basis in fact. Yet the larger part of the court's opinion deals with this question of the appeal board classification that was not argued or raised in the court below. The court below has erroneously avoided a full discussion of the crucial question of the local board's

proceeding to hear the case upon an erroneous theory, by setting up this legal straw-man of an improper classification, which is not involved on this appeal. Read the opinion of the court below, *infra,* pp. 26-30.

The quotation from *Martin* v. *United States,* 190 F. 2d 775, 777 (4th Cir. 1951), pages 29-30, *infra,* relates to the finality of classification and not to the question of the denial of procedural due process of law on personal appearance. While other parts of the *Martin* opinion dealt with the failure to allow a full hearing on personal appearance by forcing the registrant to file a written statement in lieu of an oral hearing the opinion did not deal with the denial of procedural due process of law upon a hearing where the board proceeded upon an erroneous theory of law. The *Martin* opinion is, therefore, not relevant to any of the procedural problems presented upon this appeal. The reliance by the court below principally upon the opinion in *Martin* v. *United States,* 190 F. 2d 775 (4th Cir. 1951), shows that the court below has completely missed the main point involved upon the appeal.

The court below adopted the opinion of the district court in this case. That opinion shows the procedural problem involved. Read it at the middle of page 39, *infra.* There the erroneous theory of law upon which the local board proceeded to hear the claim for classification as a minister of religion is found by the district court. There it appears the board declared that no minister of religion could be exempt as a minister under the law unless he "received pay for his services."

It is to be noticed that nowhere in the statute does the law prescribe earning of livelihood from the ministry. The Supreme Court held that this element was not required to claim the exemption.—*Dickinson* v. *United States,* 346 U. S. 389, 395-396 (1953).

It is manifest from a reading of the statute that the local board proceeded to consider petitioner's claim by pro-

ceeding to hear the case upon an erroneous theory that defied the statute.

The refusal by the local board to follow the definition of a minister of religion fixed by Congress in the act was equivalent to a complete denial of any hearing at all. A "hearing proceeding upon an erroneous theory . . . is no better than no hearing at all." (*Shepherd* v. *United States,* 217 F. 2d 942, 946 (9th Cir. 1954); see also *Sicurella* v. *United States,* 348 U. S. 385 (1955).) The denial of a hearing upon a personal appearance cannot be cured by a *de novo* classification.—*United States* v. *Laier,* 52 F. Supp. 392, 394 (N. D. Cal. 1943); *United States* v. *Romano,* 103 F. Supp. 597 (S. D. N. Y. 1952).

The ruling made by the court below in this case is in conflict with what this Court said in *Estep* v. *United States,* 327 U. S. 114, 121 (1946). There the Court said that if a "local board . . . classified a registrant as available for service, because he was a Jew, or a German, or a Negro, it would act in defiance of the law. . . . In all such cases its action would be lawless and beyond its jurisdiction." It should be noted that the Court said "local board." It knew that the appeal board had classified the registrant. It assumed that it was necessary to appeal for reclassification by the appeal board before the registrant could exhaust his administrative remedies. (*Falbo* v. *United States,* 320 U. S. 549 (1944); *Johnson* v. *United States,* 126 F. 2d 242 (8th Cir. 1942); *Skinner* v. *United States,* 215 F. 2d 767 (9th Cir. 1954)) This Court thus rejected the rationalization now accepted by the court below, which is that the appeal board reclassification cures a local board denial of procedural due process of law upon personal appearance.

In the opinion of the court below it is stated (*infra,* p. 29): "There was at no time such error of law as could vitiate the proceedings as in the case of *Sicurella* v. *United States,* 348 U. S. 385; and such errors as may have been voiced by members of the local board were rendered innocuous by the subsequent classifications by the appeals boards."

It is manifiest from a reading of this statement that the court below in making this last-quoted holding followed the new and novel doctrine announced by the Court of Appeals for the Seventh Circuit in *United States* v. *Chodorski,* No. 11699 (Sept. 28, 1956), now pending on petition for rehearing. The above-quoted holding by the court below seems to be based upon the *Chodorski* opinion, which was called to the attention of the court below on oral argument. That opinion is erroneous for the reasons above stated.

Where, as here in this case, the local board defies the statute and makes an egregious mistake of law in determining the qualifications of a minister upon a personal appearance so as to disregard completely all the evidence submitted upon personal appearance, then there is a denial of procedural due process that cannot be cured by a *de novo* classification by the appeal board.

In *Shepherd* v. *United States,* 217 F. 2d 942, 946 (9th Cir. 1954), the court said that "a hearing proceeding upon an erroneous theory . . . is no better than no hearing at all." See also *Sicurella* v. *United States,* 348 U. S. 385 (1955). While that case dealt with the consideration by the appeal board of improper factors as to the conscientious objector claim, the fact remains that it is authority here. The reason is that the court held that there was a denial of due process where the board proceeded upon an erroneous theory.—See also *Clementino* v. *United States,* 216 F. 2d 10, 12 (9th Cir. 1954); *Franks* v. *United States,* 216 F. 2d 266, 268-269 (1954).

The petitioner was denied procedural due process of law upon his hearing. It may be said that he was not entitled to the ministerial classification and consequently he was not harmed by what happened on the hearing. Without conceding that he is not entitled to the classification (*cf. United States* v. *Ransom,* 223 F. 2d 15 (7th Cir. 1955), with *United States* v. *Diercks,* 223 F. 2d 12 (7th Cir. 1955)), it is suggested that any such argument ought to be rejected. This is a specious argument.

In *United States* v. *Graham,* 108 F. Supp. 794 (N. D. N. Y. 1952), the defendant was not entitled to the ministerial classification and the court did not find he was entitled to the conscientious objector classification, but the court did hold that the denial of procedural due process of law was a basis for acquittal. (*United States* v. *Kose,* 106 F. Supp. 433 (D. Conn. 1951); *United States* v. *Fielder,* 136 F. Supp. 745 (E. D. Mich. 1954); *United States* v. *Graham,* 108 F. Supp 794 (N. D. N. Y. 1952)) Many cases have been reversed on procedural grounds notwithstanding the fact that the registrants were not entitled to claim the exemption.—*United States* v. *Henderson,* 223 F. 2d 421 (7th Cir. 1955); *Niznik* v. *United States,* 184 F. 2d 972 (6th Cir. 1950); *United States* v. *Peebles,* 220 F. 2d 114 (7th Cir. 1955).

If the argument is accepted that a defendant is not entitled to claim that there was a denial of procedural due process of law on personal appearance because he was not entitled to the classification of a minister, then it does away with the rule of strict compliance with procedural regulations entirely. It means that procedural problems do not hinge on whether the local board followed the law prescribed. It means that the courts in every case will have to determine whether the registrant was exempt. If he is exempt, he is entitled to procedural due process of law; if he is not exempt, then he is not so entitled. This is a faulty and dangerous proposition advanced as a basis for holding harmless error. It means that only the innocent are entitled to procedural rights, but the guilty have no rights. This alien doctrine is entirely foreign to the concept of due process of law familiar to us all.

While it is conceded that the petitioner may not be entitled to the ministerial classification, it is strongly insisted that the manner of proceeding by the local board to pass upon the claim for exemption as a minister of religion constitutes a denial of procedural due process of law.

It is submitted that the petitioner at his hearings was denied procedural due process of law contrary to the act

and the regulations when, upon consideration of the request for exemption as a minister of religion, the local board denied such request upon an erroneous theory of what it took to be a minister. Such denial of due process, it is submitted, made invalid the final order of the local board.

It is submitted that the foregoing reasons justify the granting of the writ in this case.

III.

When the court below held that the denial of the right to proper notice of the names and addresses of advisors to registrants as required by the regulations was cured by the *de novo* classification by the appeal board the court below decided an important question of federal law which has not been, but which ought to be, decided by this Court.

Whether a denial of procedural due process of law by a local board that fails to advise a registrant of his right to assistance through counsel of the advisors to registrants by not posting notice of the names and addresses of such advisors is an important question which is shown in the conflicting decisions by the district courts on the question. *United States* v. *Dorn,* 121 F. Supp. 171 (E. D. Wis. 1954), is typical of several cases holding that failure to give notice of help of advisors is not a denial of due process. *United States* v. *Giessel,* 129 F. Supp. 227 (D. N. J. 1955); *United States* v. *Jasmagy,* 132 F. Supp. 547 (N. D. Cal. 1955); *United States* v. *Kariakin,* S. D. Cal., No. 23221-PH, Jan. 12, 1954, and *United States* v. *Scott,* 137 F. Supp. 449 (E. D. Wis. 1956), held to the contrary or that failure to give notice of names and addresses of advisors to registrants is fatal to draft board orders as a denial of procedural due process of law.

This petition presents, as will be hereafter shown, a most important question of federal criminal law which has not been, but which ought to be, reviewed by this Court. The denial of advisor-help by failure to give notice of the

right thereto, where help of lawyers is denied, is of wide public or national importance.

The problem is not temporary or limited to just a few cases. There are about four thousand local boards with whom millions of registrants have their cases. Several hundred of these boards have failed to comply with the regulation requiring giving notice of the right to counsel of advisors. Several hundred thousand or millions of registrants are affected by the question here presented.

About six million out of the sixteen million registrants under the act are entitled to make claims for deferment or exemption from training and service fixed by Congress. A large percentage of these persons are uneducated and few, if any, are skilled in how to properly present and handle their claims before the local boards in this highly complicated field of administrative law, full of technical pitfalls for the registrant. The denial of help by lawyers before the boards has made even more necessary and important the help of the advisors to registrants required by the Selective Service Regulations.

The first regulation establishing advisors to registrants was published in Executive Order No. 8545, on September 23, 1940. These regulations required an advisory board to be composed of three lawyers, with the chairman being a judge of a county court or a court of similar jurisdiction whenever possible. Paragraph 145 of this Order stated that these boards shall "insure that advice and assistance in preparing questionnaires, claims, etc., are readily available to every registrant." Paragraph 321 provided that Advisory Boards would help registrants fill out questionnaires, and the local boards should request newspapers to publish full information about the advisory boards. It provided, in addition, that registrants who asked the local boards for advice or assistance should be directed to the advisory board. Paragraph 513 provided that members of the advisory board should serve without compensation.

By amendment effective December 9, 1940, the duties

of the advisory board were further defined "to insure that advice and assistance in preparing questionnaires, claims, or other papers which will serve as a basis for classification are readily available to every registrant."

These original regulations were numbered to conform with the requirement of publication in the Federal Register on February 1, 1943. On that date paragraph 145, as amended, was renumbered as Section 603.41, and paragraph 321 was renumbered Section 621.6 of the Selective Service Regulations. Amendment No. 318, effective July 6, 1945, deleted Section 621.6 in its entirety because it had served its purpose. In the printing of the regulations that went into effect on July 31, 1945, Section 603.41 was further amended to provide "advice and assistance in preparing Selective Service questionnaires (Form 40), claims, or other papers which will serve as a basis for classification . . ." Amendment 418, effective January 8, 1947, deleted Section 603.41 in its entirety for the reason that the appointment of advisory boards for registrants was no longer considered necessary.

In 1940 the selection and drafting of men for military service was a system that had not been necessary for some 22 years. Since the public generally was totally unfamiliar with their duties and responsibilities, the 1940 Advisory Boards fulfilled a very real need in furnishing accurate information to the registrant. As can be seen from this brief history, these Boards carried out their mission successfully. In January 1947, when the Selective Training and Service Act of 1940 expired, the Advisory Boards themselves were discontinued.

When the 1948 Act (50 U. S. C. App. §§ 451-470) was passed the President promulgated Section 1604.41 of the Selective Service Regulations (32 C. F. R. § 1604.41, E. O. 9979, 13 F. R. 4179). This regulation was to provide for assistance of advisors in preparing papers to be filed with local boards by registrants in the same manner as the registrants under the 1940 Act (50 U. S. C. App. §§ 301-318).

The history shows that the purpose in having advisors was real and practical and necessary in order that the selection of registrants would be fair and just.—62 Stat. 605, 50 U. S. C. App. § 451 (c); *Gonzales* v. *United States,* 348 U. S. 407, 417 (1955).

The Government cannot argue, as it did in the trial court, that petitioner was not harmed by the failure to comply with the regulation. How can it be said that better and more convincing papers on his full-time ministry could not have been submitted had the petitioner had the help of an advisor? Who knows whether he might have proved a prima facie case of exemption as a minister of religion, if he had been given the required help? The advisors to the registrants may have told him that it was necessary to reduce the number of hours devoted to secular work to part time instead of full time, which would have made a prima facie case. This Court cannot say, in the absence of affirmative proof from the Government, that it would have done no good for the petitioner to have the help of an advisor. The burden is upon the Government to show affirmatively facts giving basis for such a conclusion in the record. The record shows to the contrary. Read the record at pages 12-13.

Under the law the petitioner was not entitled to be represented by counsel before the local board. (*United States* v. *Pitt,* 144 F. 2d 169 3rd Cir. 1944); *Peterson* v. *United States* 173 F. 2d 11 (6th Cir. 1949); *Niznik* v. *United States,* 173 F. 2d 328 (6th Cir. 1949)) The right to be represented by counsel is a vital right. The Selective Service Regulations provide for the vital right of assistance of advisors to registrants in lieu of representation by counsel. This right is a very important one.

In order that the right be made legally available it was necessary for petitioner to have notice. The board was required to give notice. This necessary notice was not actual notice. It was constructive or posted notice. Constructive notice when required to be given is actually as important

as actual notice. For instance, if a statute requires notice by publication and this notice is not given, then the proceedings requiring such notice are void. Conspicuous posted notice at the board's office would have been necessary to give actual notice to the registrants.

It was illegal for the local board to follow the policy of not posting the notice and then not giving actual notice unless the registrants first requested the names of advisors. Posted or constructive notice by posting the notice of the assistance of advisors conspicuously in the local board's office is the very least that the local board could do in order to make up partially for the denial of legal counsel. It is a violation of due process of law not to give actual notice when it is required by the regulations. (*United States* v. *Fry*, 203 F. 2d 638 (2d Cir. 1953); *United States* v. *Stiles*, 169 F. 2d 455 (3rd Cir. 1948)) Where the statute requires constructive notice or posted notice, then the failure to give that type of notice is equally fatal.

The holding by the trial court about waiver of the right because no request for advisors was made by petitioner is error. (*Infra*, p. 52) The law does not require a request or make it a condition precedent to the posting of the names and addresses of advisors to the registrants by the local board. It is not a question involving a request. This is a notice that is required by law regardless of whether there is a request or not.

In another instance it is required of the local board that a registrant be sent a notice of classification, Form 110, following his personal appearance before the local board. The law requires this to be done, and if it is not done and the individual is brought to trial, the failure to send him notice is positive grounds for acquittal. The following authorities are positive concerning this matter when the local board omits this notice required by law: *United States* v. *Stiles*, 169 F. 2d 455 (3rd Cir. 1948); *United States* v. *Fry*, 203 F. 2d 638 (2d Cir. 1953); *United States* v. *Graham*, 108 F. Supp. 794 (N. D. N. Y. 1952); *United States* v.

Strebel, 103 F. Supp. 628 (D. Kansas 1952). No court has ever held that because the registrant did not request notice of classification he waived notice of classification. If a registrant does not waive actual notice, then by force of the same reason he does not waive constructive notice by not requesting it.

The law put the first move on the local board. The local board had to give notice first. It was obliged to give the notice regardless of whether it was requested. This requirement to give notice applies not only when the law requires actual notice but also when the law requires constructive notice. The failure to request the names of the advisors is entirely irrelevant and immaterial. It would be reversing the law and putting the responsibility upon the registrant instead of upon the local board, where the law put it. The rule announced by the court below is in effect a complete repeal of the law requiring constructive notice. If the law required registrants to ask for the names of advisors it would have said that registrants were required to ask for them. Since the regulations do not provide that the registrants must request the names of advisors, then it cannot be written into the law by the district court. The holding of the court was an innovation. The invention was wholly unauthorized. In fact it constituted a repeal of the law.

The Government will rely upon *Uffelman* v. *United States,* 230 F. 2d 297 (9th Cir. 1956); and *Rowton* v. *United States,* 229 F. 2d 421 (6th Cir. 1956); cert. denied, 351 U. S. 930. See *United States* v. *Manns,* 232 F. 2d 709 (7th Cir. 1956); and *United States* v. *Mekolichick,* petition for writ of certiorari denied Nov. 13, 1956 (No. 405). See also *United States* v. *Dorn,* 121 F. Supp. 171 (E. D. Wis. 1954); and *United States* v. *Montee,* 137 F. Supp. 381 (E. D. Wis. 1956). But all of these decisions involved a factual situation where no better papers could have been prepared than were prepared and no good and sufficient or prima facie claim for deferment could have been made. The draft files in each of the cases showed that the best showing possible had

been made. None of the cases involved a situation like that which is involved in this case, where an admittedly bona fide and meritorious claim for deferment could have been made had the registrant had the needed assistance of advisors to registrants.

The situation in this case is identical with that shown in *United States* v. *Schwartz,* 143 F. Supp. 639 (E. D. N. Y. 1956). In that case the court found, on conflicting evidence, that the board did not post the names and addresses of advisors. The facts also showed that the defendant made an inadequate claim for deferment based on extreme hardship. The court held that the failure to make a good claim by having inadequate papers constituted prejudice and harm flowing from the failure of the local board to post the names and addresses of advisors to registrants.

The facts in this case on the question of waiver of the deferment by late filing are also comparable to those in *United States* v. *Scott,* 137 F. Supp. 449 (E. D. Wis. 1956). In that case the defendant was held by the draft board to have waived his objections to civilian work as a minister by filing a written application for conscientious objector work. The court held that (where it was shown that a registrant had been held to have waived a right by filing the wrong paper) the failure to post the names and addresses of advisors to registrants was so harmful and so prejudicial as to require a judgment of acquittal. The waiver of the deferment by the late filing of the claim makes harmful the failure to post the names and addresses of the advisors in this case. See also *United States* v. *Giessel,* 129 F. Supp. 227 (D. N. J. 1955). Compare *United States* v. *Jasmagy,* 132 F. Supp. 547 (S. D. Cal. 1955); and *Chernekoff* v. *United States,* 219 F. 2d 721 (9th Cir. 1955) (commented upon in *Uffelman* v. *United States,* 230 F. 2d 297 (9th Cir. 1956)), which latter case is distinguished from this case.

Section 1604.71 of the Selective Service Regulations (32 C. F. R. § 1604.71) provides for the duties of the govern-

ment appeal agent. Section 1604.71 (d) (5) requires that the government appeal agent protect "the interests of the Government and the rights of the registrant in all matters." The government appeal agent, however, is not the official prescribed by law to assist the registrants *before the local board.* He has an altogether different duty. He is required to assist the registrants only before the appeal board; he is required to help the registrants take their appeals.

His assistance and notice of it come into play only after the registrants have lost their cases before the local board. Before local board action no notice of such help was given. Any notice that they get later is entirely too late. The principle that a *de novo* appeal board classification does not cure a local board denial of procedural due process also would apply in the giving of help by a government appeal agent in the preparation of appeal papers and the availability of such belated help by him.

The regulations specifically provide for the help of advisors to registrants in matters pertaining to the fixing of forms and the preparation of papers to be filed with the local board. All this help comes long before the appeal agent gets into the picture. What is the sense of having advisors to registrants if the availability of the government appeal agent after the local board denial makes harmless the failure to give the assistance of advisors? The position the lower court takes about the help of the government appeal agent makes vestigial the provision for the help of advisors to registrants. The availability of the help of the government appeal agent does not strike out the assistance of advisors to registrants prescribed by the regulations.

It is submitted that the failure of the board to comply with the regulation seriously and irreparably harmed the petitioner, because he could have made a prima facie case of exemption as a minister by help of advisors, and that such violation of the law, therefore, constituted a depriva-

tion of precedural rights guarenteed by the regulation, which invalidated the final order of the local board.

CONCLUSION

The petition for writ of certiorari should be granted for the reasons above stated.

Respectfully submitted,

HAYDEN C. COVINGTON

VICTOR F. SCHMIDT

Counsel for Petitioner

November, 1956.

APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7238.

John Ronald Capehart,
Appellant,

versus

United States of America,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, AT WHEELING.

(Argued October 2, 1956. Decided October 9, 1956.)

Before PARKER, Chief Judge, SOBELOFF, Circuit Judge, and BRYAN, District Judge.

Victor F. Schmidt for Appellant, and Eugene N. Barkin, Attorney, Department of Justice, (Warren Olney, III, Assistant Attorney General, Albert M. Morgan, United States Attorney, and Robert J. Schleuss, Assistant United States Attorney, on brief) for Appellee.

PER CURIAM:

This is an appeal from a conviction and sentence in a prosecution for refusing to perform civilian work by one who had been classified as a conscientious objector under the Military Training and Service Act. Appellant, who is a member of the sect known as Jehovah's Witnesses, claimed that he should have been classified as a minister of religion exempt from service under the act and that the order classifying him as a conscientious objector was void and of no effect.

Appellant filed his classification questionnaire in 1949 when he was twenty-one years of age. He claimed at that time that he was a minister of religion, also that he was a conscientious objector. In the conscientious objector questionnaire he gave the name of one Reed as the "Company Servant" of the Congregation of Jehovah's Witnesses of which he was a member. He listed his occupation as stenographer-clerk of the Chesapeake & Ohio Ry. Co., at a monthly pay of $275. He also claimed to be an ordained minister, saying, "I spend evenings and week ends in ministry work". He was given a personal hearing before the local board and was heard for about thirty minutes, but was stopped by the Board from reading and explaining draft regulations and court decisions to the Board. Subsequent to his appearance, however, he wrote a lengthy letter discussing the regulations and decisions and this was sent to the Appeal Board along with all the other matters in his file, including a lengthy letter that he had written prior to his appearance. The appellant's case was reviewed by the State Appeal Board and the Presidential Appeal Board, by both of which he was given the classification of conscientious objector given him by the local board and denied the ministerial classification which he sought.

The facts are fully and correctly set forth in the opinion of the District Judge and need not be repeated here. They are thus summarized in his opinion:

"In the case here, Capehart claimed in his original classification questionnaire that he had been a minister of Jehovah's Witnesses since August 24, 1940, apparently relying upon a formal ordination by baptism on the date when he was only twelve years of age. At the time of his registration, he was regularly employed by the Chesapeake & Ohio Railway Company, working on an average of forty-four hours per week and having been so employed for several years. He informed the Board that he did not expect to continue indefinitely at that job but expected to enter the full time ministry. However, at the time of trial, he was still employed by the Railway Company, working on an average of forty hours per week and earning considerably more than at the time of filing his classification questionnaire. This defendant claimed to be devoting approximately one hundred hours per month to religious work, but a portion of that time was spent in passing out literature on the street. In his personal appearance before the Local Board on October 29, 1951, Capehart was asked how many ministers there were in his church and he replied, according to the minutes of the Local Board, that 'he didn't know, that all of them were ministers of the gospel'. The defendant's own proof shows that his religious work was performed only part time, occasionally, and not even half time. He told the Local Board, 'I am a minister of the gospel and participate in the ministerial work because it is the most important and joyous occupation one could be engaged in. I enjoy being a minister and do this work because I rejoice in helping others to become better acquinted with their Bibles'.

* * * *

"This Court is of the opinion that there was basis in fact supporting the defendant's classification as 1-O and the denial of the ministerial classification of IV-D.

> Obviously, there was sufficient evidence in the defendant's Selective Service file upon which to base a finding that the defendant's vocation was not that of a minister of religion and that his religious activities were performed irregularly and incidentally."

Appellant was given full opportunity to present his case; and it was fully presented to the local board as well as to both appeal boards. The fact that the local board, after hearing him present his cause for half an hour, was unwilling to listen longer to a discussion of court cases and draft regulations, cannot reasonably be held either a denial of due process or the denial of the personal hearing which the act requires. There was at no time such error of law as would vitiate the proceedings as in the case of Sicurella v. United States 348 U.S. 385; and such errors as may have been voiced by members of the local board were rendered innocuous by the subsequent classifications by the appeals boards.

The decision appealed from should be affirmed for reasons adequately stated in the opinion of the District Judge. See also Estep v. United States 327 U.S. 114, 122; Cox v. United States 332 U.S. 442, 453; Witmer v. United States 348 U.S. 375, 381; Martin v. United States 4 Cir. 190 F. 2d 775, 777. In the case last cited, which involved, as does the case here, a claim by a full time railroad employee that he was a minister of religion because he devoted some time to religious work as a member of Jehovah's Witnesses, we said:

> "Since all members of Jehovah's Witnesses claim to be ministers of religion, the duty devolves upon the draft board of deciding whether one claiming exemption on that ground is in reality a minister of religion within the meaning of the Selective Service Act; and we cannot say that there is no reasonable basis for the action of the board in refusing such classification here. The courts are given no power or review over the

draft boards. If there is a substantial basis for the order, it must be sustained, Cox v. United States, 332 U.S. 442, 448-452, 68 S.Ct. 115, 92 L. Ed. 59; Estep v. United States, 327 U.S. 114, 122-123, 66 S. Ct. 423, 427, 90 L. Ed. 567. As said in the case last cited: 'The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant. See Goff v. United States, 4 Cir., 135 F. 2d 610, 612.'

"The case of Goff v. United States, 4 Cir., 135 F. 2d 610, 612, cited by the Supreme Court in the passage quoted is a decision of this court wherein we said with respect to the power to hold the order of the draft board invalid: 'This does not mean that the court in a criminal proceeding may review the action of the board. That action is to be taken as final notwithstanding errors of fact or law, so long as the board's jurisdiction is not transcended and its action is not so arbitrary and unreasonable as to amount to a denial of constitutional right.' "

Affirmed.

APPENDIX B

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7238.

Jack Ronald Capehart, Appellant,

vs.

United States of America, Appellee.

Appeal from the United States District Court for the Northern District of West Virginia.

This cause came on to be heard on the record from the United States District Court for the Northern District of West Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

October 9th, 1956.

JOHN J. PARKER

Chief Judge, Fourth Circuit.

APPENDIX C

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CORCUIT

No. 7238.

John Ronald Capehart, Appellant,

versus

United States of America, Appellee.

Appeal from the United States District Court for the Northern District of West Virginia, at Wheeling.

This Court having rendered its decision affirming the decision of the United States District Court for the Northern District of West Virginia, and the appellant having on October 22, 1956, filed with the Court a petition for a rehearing of said cause, and same having been fully considered:

It is now here ordered that the rehearing asked for be and same is hereby denied.

JOHN J. PARKER
Chief Judge, Fourth Circuit.

ALBERT V. BRYAN
United States District Judge.

SIMON E. SOBELOFF
United States Circuit Judge.

FILED
OCT 31 1956
R.M.F. WILLIAMS, JR.
CLERK

APPENDIX D

Opinion of District Court

In the
DISTRICT COURT OF THE UNITED STATES
For The Northern District of West Virginia
At Wheeling

Caption — Cr. No. A-6710

John R. Morris, United States Attorney, Clarksburg, West Virginia, and R. J. Schleuss, Assistant United States Attorney, Fairmont, West Virginia, for the plaintiff.

Victor F. Schmidt, Columbus, Ohio and Horace S. Meldahl, Charleston, West Virginia, for the defendant.

H. S. BOREMAN, District Judge.

An indictment was returned by the grand jury for the Northern District of West Virginia on the 6th day of April, 1954, against the defendant, Jack Ronald Capehart. Count No. 1 was dismissed on motion of the defendant with consent of the United States Attorney. Count No. 2 of the indictment, with which we are concerned, charged that the defendant, having been classified by Local Board No. 2, Selective Service System, Cabell County, Huntington, West Virginia, as a conscientious objector and found fit for general service, did knowingly and wilfully fail, neglect and refuse to perform civilian work of national importance at Weston State Hospital, Weston, West Virginia, after having been notified to report for and perform such work by order dated the 19th day of August, 1953, in violation of Title 50, Appendix, Section 462(a), United States Code.

The defendant filed his motion to dismiss the indictment and discharge him on the ground that he had been deprived of a speedy trial to his prejudice, in violation of the Sixth Amendment to the Constitution of the United States, Rules of Criminal Procedure 48(b), Article 3, Section 14, of the Constitution of the State of West Virginia and Chapter 62, Article 3, Section 21 (6210), of the Code

of West Virginia. This case was called for trial on January 24, 1956, and the motion to dismiss was overruled since the defendant had made no affirmative request or demand for trial at any time between the finding of the indictment and the trial date. By consent and agreement, the case was tried before the Court in lieu of a jury.

Following the presentation of evidence, the defendant filed a written motion for judgment of acquittal, the grounds assigned in support of such motion being briefly outlined as follows:

(1) and (2) There was no evidence that defendant is guilty as charged, and the Government failed to prove a violation of the Act and the Regulations;

(3) The Local Board refused to classify the defendant as IV-D, contrary to the definition of a regular and duly ordained minister of religion, the denial of the ministerial classification being illegal, arbitrary and capricious because the Local Board employed artificial standards in determining what constitutes a minister of religion;

(4) The Local Board prevented the defendant from having a fair hearing when he appeared on October 29, 1951, because the Board repeatedly stopped the registrant, in violation of the Fifth Amendment to the Constitution of the United States;

(5) The Local Board would not hear the registrant in his explanation of the law relative to the exemption of ministers, in violation of Section 1624.2 of the Regulations and in violation of "Procedural Due Process", as guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States;

(6) The Local Board at the hearing on October 29, 1951, acted upon its own standard "as what constituted a minister as one who preached from the pulpit and earned his own living from the ministry", repeating the charge that the Local Board would not listen "to the correct statement of the law in the hands of the registrant", all in violation of Section 1624.2 and 1622.43 of the Regulations;

(7) At the hearing on October 29, 1951, the Local Board asserted that it had not granted any of Jehovah's Witnesses a IV-D ministerial classification and it never intended to do so in the future, thus indicating prejudice and discrimination against the defendant, in violation of Section 1622.1(d) of the Regulations;

(8) The Local Board failed to post, conspicuously in its office, the names and addresses of advisors to registrants, in violation of Section 1604.41 of the "Rules of the Selective Service System".

Although no request was made, the Court has deemed it necessary, in fairness to the defendant, to full recite the facts, the procedural steps taken, the claims made by the defendant, and the conclusions of law, all of which follow.

Defendant was registered with Local Board No. 2 at Huntington, Cabell County, West Virginia. He was born on July 17, 1928, and on May 16, 1949, he being then twenty years of age, filed his classification questionnaire in which he stated that, by reason of religious training and belief, he was conscientiously opposed to participation in war in any form; that he was a minister of religion; that he was regularly serving as a minister; that he had been a minister of Jehovah's Witnesses since August 24, 1940, having been formally ordained on that date. His questionnaire stated that he was then employed by the Chesapeake & Ohio Railway Company as a stenographer-clerk, doing clerical, typing and shorthand work, having been so employed for three and one-half years; that he worked on an average of forty-four hours per week, earning $9.70 per day; that he did not expect to continue indefinitely at that job but expected to enter the full-time ministry. Under Series VIII, "Present Occupation", line 7, appears the following: "Other business or work in which I am now engaged is ministry".

With the classification questionnaire, defendant filed with the Local Board a paper bearing twenty-seven signatures, certifying as follows: "That we, the undersigned,

witness the fact that Jack Ronald Capehart is an Ordained Minister of the Gospel and that he regularly and customarily preaches and teaches the word of God as set forth in the Bible". The defendant filed at the same time additional information in writing, from which is quoted the following: "I have been engaged in ministerial work since 1940. My ministry work consists of preaching and teaching the word of God as set forth in the Bible and doing so publicly and from house to house * * * My ministry work also consists of making return calls on interested persons and holding Bible studies with them if they so desire * * *. I also hold a special position in the Organization and give personal counsel relative to it and other matters pertaining to preaching the Gospel from the platform at our Company meetings. Also, I am enrolled in a ministry school in the organization, in which we make a through study of the different books of the Bible, as to who wrote them, the time of writing, etc. I average around 100 hours each month in the ministerial work. I am a minister of the Gospel and participate in the ministerial work because it is the most important and joyous occupation one could be engaged in. I enjoy being a minister and do this work because I rejoice in helping others to become better acquainted with their Bible * * *. I am enclosing an identification card issued by the Watchtower Bible and Tract Society, 117 Adams Street, Brooklyn 1, N.Y., identifying me as an Ordained Minister of the Gospel".

On May 23, 1949, defendant filed a special form claiming exemption as a conscientious objector, in which he stated that he became a member of Jehovah's Witnesses about 1935 at Huntington by attending Bible studies with his mother; that he had studied with other Jehovah's Witnesses at their local Kingdom Hall; that he had studied the Bible at home and proved facts for himself; that he had given constant public expression to his views "by ministering to the public from door to door in Huntington and vicinity." He further stated that he had worked since 1944, first, as a

machinist apprentice for the C. & O. Railway Company at Huntington, West Virginia, next as an equipment installer for Western Electric Telephone Company and, from 1945 to the time of filing this special form, as a stenographer for the C. & O. Railway Company.

Under Series IV, question 2(d), the following appears in the printed form: "Give the name, title and present address of the pastor or leader of such church, congregation or meeting". The answer given was "Kenneth B. Reed — company servant of Huntington company of Jehovah's Witnesses". Attached to the special conscientious objector form was a separate sheet which contained the following typewritten paragraph: "The Selective Service National Headquarters has determined that Jehovah's Witnesses and the Watchtower Bible and Tract Society constitute a recognized religious organization, and that all of Jehovah's Witnesses who are regularly and customarily teaching and preaching the doctrines of the Bible as advocated by Jehovah's Witnesses are entitled to exemption as ministers of religion". This was followed by another statement: "I claim neutrality and the rights of neutrals because of my status as a minister".

On May 24, 1949, the Local Draft Board, by unanimous vote, classified the defendant as a conscientious objector, Class IV-E. On June 2, 1949, the Board was notified that registrant desired to appeal from the Board's classification and defendant's file was shortly thereafter forwarded to the Appeal Board. On September 17, 1949, the Appeal Board determined that defendant should not be classified in either I-A-O or IV-E, and the case was referred to the Department of Justice for investigation. The defendant appeared before a Hearing Officer of the Federal Bureau of Investigation on February 9, 1950, and was examined at length. The written report of the Hearing Officer discloses that the defendant was then employed by the C. & O. Railway Company at Huntington; that be came a member of the sect known as Jehovah's Witnesses in 1935, when he was

about seven years old, and was brought up in its teachings by his mother; that, "as all of these people do, he claims to be a Minister of the Gospel and * * * in his examination before your Hearing Officer, he insisted that he should have been placed in Class IV-D as a minister". He was examined at length as to his conscientious objection to warfare and the report of the Hearing Officer indicates that the defendant was not familiar with a number of well known Biblical Stories. However, the Hearing Officer reported that he was satisfied that the registrant was sincere in his views relating to warfare and that and FBI investigation supported this view for a number of persons had been interrogated. The Hearing Officer recommended that the defendant be classified as IV-E.

On October 24, 1949, the Appeal Board continued the defendant in Class IV-E. On March 7, 1951, through some error, the Local Board changed defendant's classification from IV-E to III-A, but subsequently, on October 18, 1951, corrected its mistake and classified defendant in Class I-O (conscientious objector available for civilian work contributing to the maintenance of the national health, safety or interest). At defendant's request, the Local Board granted him a personal appearance hearing on October 29, 1951. At the conclusion of the hearing, the Local Board continued defendant's classification as I-O by a vote of 3 to 0.

The defendant's Selective Service System file was introduced in evidence at the trial. This file contains a record of the hearing before the Board at which time the defendant requested a minister's classification of IV-D. It appears from the record that the Board inquired if the defendant had a church of his own in which he preached, and he replied that he did not but did other work, such as passing out literature on the street and teaching. He was then asked how many ministers they had in his church and he replied, "he didn't know, that all of them were ministers of the gospel". The Board told him that its members considered a deacon or elder in a Baptist, Methodist or Presbyterian Church as

doing that kind of work, and if they gave all of Jehovah's Witnesses a IV-D Classification, they would feel they should give all deacons and elders the same classification. The defendant asked permission to read some of the Supreme Court decisions involving Jehovah's Witnesses but Mr. Keadle (a Board member and a reputable lawyer of the City of Huntington) told him that he would be glad to sit and talk to him all day but other registrants were waiting to make personal appearances.

The record of the hearing discloses that the defendant was of the opinion that the Board was prejudiced against Jehovah's Witnesses. He was informed that the Board was not prejudiced but "according to their interpretation of the Selective Service Laws, a 4-D Classification was for a minister who preached for a church or congregation as their minister and received pay for his services, or one who was in a recognized school preparing for the ministry". The record indicated that the Board had reviewed defendant's file, as appears from the following: "According to the information in Mr. Capehart's file, he works for the C. & O. Railway Company as Stenographer-Clerk at a salary of $275.00 per month. The defendant was notified by the Board that he had a right of appeal, to which he replied that he would appeal, that he would never go into the service or into work contributing to the war, "That he would take his case to the higher courts who were not prejudiced against Jehovah's Witnesses and who had never decided a case against them".

Prior to the hearing, the defendant filed a supplementary information sheet dated October 16, 1951, wherein he described his occupation as a stenographer-clerk for the Chesapeake and Ohio Railway Company at Huntington, West Virginia, at a monthly salary of $275.00. Following this description was added, "Also Ordained Minister — Note: I spend evenings and week ends in ministry work". With the supplementary information sheet, defendant filed a letter addressed to the Board and six affidavits, the

affiants being Jehovah's Witnesses. These affidavits contained statements to the same general effect that the defendant was recognized by the Watchtower Bible and Tract Society as an ordained minister of the gospel; that the defendant preached from house to house, conducted Bible studies in the homes and from the platform of the local Company of Jehovah's Witnesses. One affidavit stated that affiant was the assistant Presiding Minister to serve in the Huntington Congregation of Jehovah's Witnesses; that he worked daily with Jack Ronald Capehart in the organizational work, as well as ministerial work. In the letter hereinbefore mentioned, defendant called the Board's attention to certain court decisions and stated: "Aside from my ministerial work from house to house, etc., I have been specially appointed by the Watchtower Bible and Tract Society to serve in the Huntington, W. Va., Congregation of Jehovah's Witnesses. I am an Assistant to the Presiding Minister or Company Servant, who is in direct charge of the activities of the Huntington Congregation of Jehovah's Witnesses. I also conduct one of the weekly Bible studies at our local Kingdom Hall at 301 Second Street, Huntington, W. Va. It is hoped that the above will enable you to properly classify me in IV-D, a minister's classification".

On November 5, 1951, following the hearing on October 29, 1951, the defendant furnished to the Board a photostat copy of an order entered by the Clerk of the County Court of Cabell County, West Virginia, which order recited that Jack Ronald Capehart, a Minister of the Gospel, duly ordained by the Watchtower Bible and Tract Society, Brooklyn 1, New York, (Jehovah's Witnesses), "be and he hereby is, authorized to celebrate the Rites of Matrimony in all counties of the State of West Virginia". A letter from defendant asked that this document be placed in his file and advised that an appeal from his classification would reach the Board in two or three days. On November 7, 1951, the Board received a six-page letter dated November 5, 1951, requesting an appeal, requesting classification as IV-D and

containing information for the use of the Appeal Board in determining his "case". One paragraph of the defendant's letter is quoted as follows: "I have served in special ministerial positions for the past two years by special appointment by the Watchtower Bible and Tract Society (Jehovah's Witnesses), a legal recognized religious organization. Capacities served in have been Territory Servant and Advertising Servant. Both of these ministerial positions are listed in Opinion No. 14 of General Hershey, which I have quoted, and are to be considered for classification as ministers. My present position is Accounts Servant, which is the same as an assistant to the Presiding Minister in the orthodox churches". He purported to quote from General Hershey's Opinion No. 14, stating that the same was incorporated into State Director advice as follows: "Members of Jehovah's Witnesses, known by the various names of Servants to the Brethren, Company Servant, Assistant Company Servant, Back-call Servant, Territory Servant, Advertising Servant, Accounts Servant, Stock Servant and other servants, devote their time and effort in varying degrees to the dissemination of the tenets and beliefs of Jehovah's Witnesses. Often the Servants to the Brethren and the Company Servants are found to be devoting their lives to a work of ministry to the substantial exclusion of secular employment. In such cases, they may be considered for classification into Class IV-D as ministers of religion". The defendant, in his letter of November 5, 1951, states that he is the Accounts Servant; that he has charge of accounts records; that he is the Bible Study Instructor at the local Kingdom Hall each Wednesday evening; that he prepares and delivers talks at their various meetings; that almost every evening that is not spent at a meeting is spent in some phase of the ministerial work; that he does street witnessing on Saturday; that on Sunday he does preaching work from door to door and takes part in meetings at the Kingdom Hall; that just because he does secular work does not deny him the right to status as Minister of Religion.

On November 15, 1951, the Local Board received another letter from defendant, with which was enclosed a photostat copy of a certificate from T. J. Sullivan, who signed as "Superintendent of Ministers and Evangelists of Watchtower Bible and Tract Society, Incorporated". The certificate is dated November 9, 1951, and certifies, in effect, that the defendant is a duly Ordained Minister of Jehovah's Witnesses engaged in preaching and teaching the principles of this Society and administering the rites and ceremonies thereof in public worship; that he presently officiates as Assistant Presiding Minister of the Huntington, West Virginia, Congregation of Jehovah's Witnesses; that he also regularly and customarily engages in preaching the doctrines and principles of Jehovah's Witnesses as a Missionary Evangelist; that he is authorized to perform the ordinary rites and ceremonies, such as the baptismal ceremony, the burial ceremony, etc.; that, since March 22, 1949, he has been serving as Bible Study Conductor of the foregoing Congregation, in which capacity he presides over Bible studies at certain designated meeting places throughout the Congregation's assigned territory, and generally supervises the ministerial activities of Jehovah's Witnesses from such meeting places.

All of this additional information received by the Local Board following the October 29, 1951, hearing was transmitted by the Local Board to the State Director of Selective Service, and by the Selective Service Headquarters to the Appeal Board. The Appeal Board continued registrant's classification as I-O.

In February of 1952, the defendant addressed a letter to Major General Lewis B. Hershey and the State Director of Selective Service requesting that his case be reviewed by the President, and on February 29, 1952, the National Director of Selective Service gave notice of such appeal.

The "minutes of action upon appeal to the President by National Selective Service Appeal Board" showed that the defendant was classified 1-O by a vote of 2 to 1 on June

18, 1952. On July 4, 1952, the defendant addressed another letter to Major General Lewis B. Hershey and the West Virginia State Director of Selective Service, insisting that he was then entitled to an appeal to the "Presidential Appeal Board" and calling attention to information contained in his file. On July 8, 1952, the Local Board was advised that the defendant's case had been appealed to the Presidential Appeal Board on February 29, 1952, that the appeal had been acted upon and that no further action would be taken.

On July 9, 1952, the defendant was ordered to report on July 22, 1952, for a physical examination. The defendant appeared and submitted to examination but there appeared in his file a typewritten paper dated July 22, 1952, bearing his signature and as follows: "To whom it may concern: I am an Ordained Minister of Jehovah's Witnesses and should have a 4-D Classification; nevertheless, I have been placed in classification I-O and ordered to take this physical examination. I am, therefore, submitting to this examination but I will not enter into military service, either combatant or non-combatant service, nor will I perform civilian work contributing to the maintenance of the national health, safety or interest, other than the secular work that I now perform as a stenographer and clerk for the Chesapeake & Ohio Railway Company, which work is done solely for the purpose of enabling me to continue in the ministerial work. I am an Assistant Presiding Minister of the Huntington, W. Va., Company of Jehovah's Witnesses by special appointment from the Watchtower Bible and Tract Society, of Brooklyn 1, New York. Acceptance of any type of work would hinder me in performing my ministerial duties".

The defendant was certified as physically acceptable and he was sent SSS form No. 152 upon which to indicate a selection of types of civilian work, but on August 11, 1952, the Local Board received a letter from the defendant dated August 9, 1952, in which he indicated that he would not accept any type of civilian work and that he would not fill out the form, stating "in addition to my ministerial ac-

tivity, however, I am also engaged at the present time in secular employment as a stenographer and clerk for the Chesapeake & Ohio Railway Company. This work is done solely for the purpose of enabling me to continue in the ministerial work because Jehovah's Witnesses do not burden anyone down with the responsibility of providing for their material needs. If I was financially able, I would devote all my time to the ministerial work".

On December 10, 1952, the defendant appeared before the Local Board, a representative of the State Director of Selective Service being present, and the defendant was asked if he was familiar with Selective Service Regulations dealing with conscientious objectors, to which he replied that he was. The defendant stated that he had received information sent him by the Board as to different types of work he might perform in lieu of induction, but that he had refused to do any work. He was asked if he still was employed by the C. & O. Railway Company and he answered that he was. He was asked what his wages were and he replied that he worked five days per week at $14.55 per day. He was then asked if he still refused to do any type of work and he replied, "Yes, sir, I do".

Following the prescribed procedure, on August 19, 1955, the Local Board ordered the defendant to appear on August 31, 1953, for hospital work at the State Hospital at Weston, West Virginia, which is an institution operated and maintained by the State of West Virginia for the mentally ill. The defendant appeared at the Hospital pursuant to the notice but refused employment.

The Court further finds from the evidence that at defendant's hearing on October 29, 1951, the Local Board did not assert that it never intended, in the future, to grant any of Jehovah's Witnesses a IV-D ministerial classification, as charged by the defendant. The defendant testified at his trial that he was still working for the C. & O. Railway Company at Huntington approximately forty hours per week. Local Board No. 2 did not post in its office a list of

the names and addresses of advisors to registrants, but advisors had been named and such list was on the desk of the clerk. The defendant did not ask for such list although he must have been aware of the regulation with respect to such posting since he testified that he looked for but found no such list.

The objects sought to be attained by the Selective Service Act were national defense and military preparedness. The assignment of conscientious objectors to work for the protection of the public health bears a real and important relationship to those objects. United States v. Hoepker, United States v. Thomas, United States v. Smith (all three cases considered together), 223 F. 2d 921, 7th Circuit, June 13, 1955, rehearing denied July 14, 1955, certiorari denied October 10, 1955. The State Mental Hospital at Weston, West Virginia, to which the defendant was ordered to report for work, is an institution which has for its purpose the care and restoration of those in impaired mental health. The order of the Local Board requiring the defendant to report for work was clearly within the language of the statute and the regulations. Pormorski v. United States, 222 F. 2d 106, 6th Circuit, April 28, 1955, certiorari denied October 10, 1955.

The facts are clear that the defendant appeared at the Hospital to which he was assigned for work of national importance pursuant to the order of the Local Draft Board, but he refused to work. He based his refusal on the claim of his right to a ministerial classification, and the primary issue to be determined here is whether or not he was properly denied the classification of ministry.

Pertinent provisions of the Selective Service Act of 1948, as amended, Title 50 U. S. C. A., Appendix are as follows:

"§ 466. Definitions.

• • •

"(g) (1) The term 'duly ordained minister of religion' means a person who has been ordained,

in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

"(2) The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

"(3) The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."

The Act also provides that the decisions of the Local Board "shall be final except where an appeal is authorized and is taken in accordance with such rules and regulations as

the President may prescribe". Title 50 U. S. C. A. Appendix, § 460 (b) (3).

The burden is on the claimant to prove himself to be within the group entitled to the ministerial classification. United States v. Simmons, 7th Circuit, 213 F. 2d 901, 903, United States v. Blankenship, 127 F. Supp. 760, 765.

In the case of Estep v. United States, 327 U. S. 114, 66 S. Ct. 423, 90 L. Ed. 567, it was decided: "The provision making the decisions of the Local Boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which it obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the Local Boards was justified. The decisions of the Local Board, made in conformity with the regulations, are final even though they may be erroneous. The question of jurisdiction of the Local Board is reached only if there is no basis in fact for the classification which it gave the registrant."

In 1947, the United States Supreme Court, in the case of Cox v. United States, 332 U. S. 442, 68 S. Ct. 115, 92 L. Ed. 59, cited the Estep case with approval and, on the question of the right of judicial review, said: "Although we held in Estep that Congress did not intend to cut off all judicial review of a Selective Service order, petitioners have full protection by having the issue submitted to the Trial Judge and the reviewing courts to determine whether there was any substantial basis for the classification order. When the Judge determined that there was a basis in fact to support classification, the issue need not and should not be submitted to the jury. Perhaps a court or jury would reach a different result from the evidence but as the determination of classification is for selective service, its order is reviewable 'only if there is no basis in fact for the classification' ".

Later, subsequent to the Estep and Cox decisions, the case of Dickinson v. United States, 346 U. S. 389, was de-

cided by the United States Supreme Court in November 1953, in which case the Court stated: "The principal and decisive issue before us is whether there was a basis in fact for denying Dickinson's claim to a ministerial exemption under Article 6 (g) of the Universal Military Training and Service Act, 62 Stat. 611, 50 U. S. C. App., Article 456 (g)". The foot note on page 390 indicates that the title was changed from the "Selective Service Act of 1948" to the "Universal Military Training and Service Act" by 65 Stat. 75. The provisions of the Universal Military Training and Service Act, pertaining to the ministerial classification, are identical with the provisions of the Selective Service Act of 1948 hereinbefore quoted.

In the Dickinson case, the defendant has been denied a ministerial classification and was convicted in the lower court for refusing to submit to the Local Board's induction order. The Supreme Court reversed the conviction on the ground that there was no basis in fact for denying Dickinson's claim to ministerial exemption. In the case of Witmer v. United States, 348 U. S. 375, 381, the Supreme Court cited with approval the Estep case and distinguished the Dickinson case, holding "the classification can be overturned only if it has 'no basis in fact'. It follows that the denial of a requested classification is governed by the same rule. In the Dickinson case, the defendant, a Jehovah's Witness, originally claimed a IV-D for ministerial Classification in 1948, shortly after he registered under the Selective Service Act. He stated in his questionnaire that he was a regular, but not an ordained, minister and was working forty hours a week as a radio repair man. From other documents submitted to the Board, it appeared that he devoted an uncertain number of hours a week leading two Bible study groups and several hours each week to preaching to the public. The board classified him 1-A in July 1950.

In the spring of 1949, Dickinson left his 40-hour a week job as radio repairman and was ordained as a minister. He began working as a fulltime Pioneer Minister, devoting 150

hours each month to religious work, conducting three or four meeting each week at a public hall. He also instructed prospective ministers, receiving no salary for his missionary or Company Servant work. He lived on $35.00 a month earned by his weekly average of five hours of radio repair work. This modest income, a very low monthly rental for an apartment, self-performance of household tasks and invitations to various private homes, enabled him to subsist. Despite this change in Dickinson's activities, the Board continued him in 1-A.

The Supreme Court in the Dickinson case stated (346 U. S. 394, 395): "The ministerial exemption, as was pointed out in the Senate Report accompanying the 1948 Act, 'is a narrow one intended for the leaders of the various religious faiths and not for the members generally' * * *. Certainly all members of a religious organization or sect are not entitled to exemption by reason of their membership, even though in their belief each is a minister. * * * Each registrant must satisfy the Act's rigid criteria for the exemption. Preaching and teaching the principles of one's sect, if performed part time or full time, occasionally or irregularly, are insufficient to bring a registrant under Article 6 (g). These activities must be regularly performed. They must, as the statute reads, comprise the registrant's 'vocation'. And since the ministerial exemption is a matter of legislative grace, the Selective Service registrant bears the burden of clearly establishing a right to the exemption."

The Dickinson case is clearly distinguishable on the facts from the instant case. Dickinson worked only five hours per week as a radio repair man after his ordination and after he began devoting practically his entire time to the performance of claimed ministerial duties. There was a material change in his manner of living, indicating an intention on his part to devote his full time to the ministry except the very few hours each week devoted to secular work in order to provide the barest necessities.

In the case here, Capehart claimed in his original classi-

fication questionnaire that he had been a minister of Jehovah's Witnesses since August 24, 1940, apparently relying upon a formal ordination by baptism on that date when he was only twelve years of age. At the time of his registration, he was regularly employed by the Chesapeake & Ohio Railway Company, working on an average of forty-four hours per week and having been so employed for several years. He informed the Board that he did not expect to continue indefinitely at that job but expected to enter the fulltime ministry. However, at the time of trial, he was still employed by the Railway Company, working on an average of forty hours per week and earning considerably more than at the time of filing his classification questionnaire. This defendant claimed to be devoting approximately one hundred hours per month to religious work, but a portion of that time was spent in passing out literature on the street. In his personal appearance before the Local Board on October 29, 1951, Capehart was asked how many ministers there were in his church and he replied, according to the minutes of the Local Board, that "he didn't know, that all of them were ministers of the gospel". The defendant's own proof shows that his religious work was performed only part time, occasionally, and not even half time. He told the Local Board, "I am a Minister of the gospel and participate in the ministerial work because it is the most important and joyous occupation one could be engaged in. I enjoy being a Minister and do this work because I rejoice in helping others to become better acquainted with their Bibles".

The record discloses that the defendant has fallen far short of making a prima facie showing that he should have been classified as a Minister, and his religious work did not, in accordance with the statute, comprise the defendant's "vocation". The defendant complains that the Local Board's denial of the ministerial classification was illegal, arbitrary and capricious; that the Local Board employed artificial standards in determining what constitutes a min-

ister of religion and acted upon its own standard "as what constituted a minister was one who preached from the pulpit and earned his own living from the ministry". It is true that the minutes of the hearing before the Local Board on October 29, 1951, contain the following: "According to their interpretation of the Selective Service Laws, a IV-D classification was for a minister who preached for a church or congregation as their minister and received pay for his services, or one who was in a recognized school preparing for the ministry". However, the same minutes show that the defendant was asked how many ministers there were in his church and he replied, in effect, that he didn't know and that all of the members of Jehovah's Witnesses were ministers of the gospel. The same minutes show that the Board considered the fact that the defendant worked for the C. & O. Railway Company as a stenographer-clerk at a salary of $275.00 per month, thus indicating that the Board members felt that his work for the Railway Company was his real vocation. These minutes of the hearing, together with all information appearing in the defendant's file, were reviewed on the appeals, reference to which has been heretofore made. The classification of 1-O or conscientious objector, was approved at every step of the administrative procedure and the ministerial classification was denied. The State Appeal Board and the National Selective Service Appeal Board (Presidential Appeal Board) placed the defendant in Class 1-O. The action of the Appeal Board completely superseded the action of the Local Board in classifying the registrant even though the classification was the same. Cramer v. France, 148 F. 2d 801; Tyrell v. United States, 200 F. 2d 8; Reed v. United States, 205 F. 2d 216. The allegations of the defendant as to prejudice of the members of the Local Board, or antipathy to the religious sect of which the defendant was a member, even if sustained by proof, were not relevant after the Appeal Boards had acted. Falbo v. United States, 320 U. S. 555 (concurring opinion of Justice Rutledge).

The Defendant contends that he was denied a fair hearing before the Local Board because the Board would not permit him to cite and discuss certain court decisions touching upon his claim to a ministerial exemption. However, the record discloses that he was given a hearing and that the Local Board had before it a letter from the defendant in which he undertook to cite several pertinent court decisions. Selective Service Regulations 1624.2(b) provides: "* * * The member or members of the Local Board before whom the registrant appears may impose such limitation upon the time which the registrant may have for his appearance as they deem necessary".

The defendant complains of the failure of the Local Board to post, conspicuously in its office, the names and addresses of advisors to registrant. The Court has found, as a fact, that even though the list of the names and addresses of such advisors was not posted on the wall of the office of the Local Board, yet advisors had been appointed and a list of such advisors was on the desk of the clerk. The defendant testified that he looked for the posted list but failed to find it. Obviously, he was aware of the regulation with respect to such posting and the information was readily available to him through a simple request, which he did not make. In United States v. Dorn, 121 F. Supp. 171 (E. D. Wis. 1954), the Court held: "The appointment of advisors is not such an inherent element of fair procedure that the failure to appoint and post them automatically invalidates the proceedings".

The defendant, Capehart, followed the procedures available to him in an effort to secure the ministerial classification. He appealed from the decision of the Local Board even to the Presidential Appeal Board, and in each instance the classification accorded him by the Local Board was upheld. At every stage of the proceedings, the defendant made it known that he would not comply with any order of the Board which failed to recognize his claim to exemption as a minister. The defendant had collected and submitted to

the Local Board affidavits, certificates and full and complete information concerning his claim to exemption. The record discloses that the Local Board had all of this information before it, and the same information was in his file when the case was reviewed on appeal. "The posting of advisors could not have affected the defendant's situation since he admits he would refuse to perform any form of civilian work because it would interfere with his preaching." United States v. Manns, 135 F. Supp. 624. Cf. Chernekoff v. United States, 219 F. 2d 721; United States v. Giessel, 129 F. Supp. 223; United States v. Rowton, 130 F. Supp. 189.

This Court is of the opinion that there was basis in fact supporting the defendant's classification as 1-O and the denial of the ministerial classification of IV-D. Obviously, there was sufficient evidence in the defendant's Selective Service file upon which to base a finding that the defendant's vocation was not that of a minister of religion and that his religious activities were performed irregularly and incidentally. The defendant's motion for judgment of acquittal is denied. The Court finds the defendant guilty as charged in the second count of the indictment.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 604

JACK RONALD CAPEHART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A 26–30) is reported at 237 F. 2d 388. The opinion of the District Court (Pet. App. D. 33–53) is reported at 141 F. Supp. 708.

JURISDICTION

The judgment of the Court of Appeals was entered on October 9, 1956 (Pet. App. B 31), and a petition for rehearing was denied on October 31, 1956 (Pet. App. C 32). The petition for a writ of certiorari was filed November 29, 1956. The jurisdiction of this court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

On a trial for refusal to perform work of national importanee, petitioner, although not denying that there was basis in fact for denial of his claim to ministerial exemption, attacked the validity of his classification because of alleged procedural errors with respect to such claim. The questions presented are:

1. Whether the error of the local board in believing that it was necessary for a registrant to receive pay for ministerial activities invalidated petitioner's ultimate classification where he was classified *de novo* by the Appeal Board and the National Selective Service Appeal Board, and it is not claimed that those boards erred in the basis for their classification or were deprived of any pertinent facts.

2. Whether failure to have the names of advisors posted in the local board office as provided by the then applicable regulations was a violation of due process which invalidated the ultimate classification, where the registrant was aware of the requirement, the list was on the desk of the clerk of the local board, and was available to the registrant at his request.

STATUTE AND REGULATIONS INVOLVED

Section 16 (g) (1), (2), and (3) of the Universal Military Training and Service Act (62 Stat. 624, 50 U. S. C. App. 466 (g) (1), (2), and (3)) defines the term "minister" as:

> The term "duly ordained minister of religion" means a person who has been ordained, in accordance with the ceremonial, ritual, or dis-

cipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

(2) The term "regular minister of religion" means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

(3) The term "regular or duly ordained minister of religion" does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization.

Section 1604.41 of the Selective Service Regulations (32 C. F. R., Section 1604.41) on the pertinent dates provided:[1]

> Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office.

Section 1622.43 of the Selective Service Regulations (32 C. F. R. Section 1622.43) reads in part as follows:

> 1622.43 Class IV–D; Minister of Religion or Divinity Student.—(a) In Class IV–D shall be placed any registrant:
>
> (1) Who is a regular minister of religion;
>
> (2) Who is a duly ordained minister of religion; * * *

Selective Service Regulation 1626.12 provides:

> The person appealing may attach to his appeal a statement specifying the matters in which

[1] The regulations were changed on January 31, 1955 (E. O. 10594, 20 F. R. 735), from "shall" to "may" in order that appointments would be made only where the community situation demonstrated a need for such advisors. We have been advised that it has been the experience of many State Headquarters that the local board clerk, the Government Appeal Agent, and the local board members have ample time to advise registrants as to their rights and duties and to assist them in filling out questionnaires and other forms.

he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or to give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.

STATEMENT

Petitioner, who waived a jury trial, was convicted in the United States District Court for the Northern District of West Virginia for refusal to perform civilian work of national importance as ordered by his Local Selective Service System Board (R. 106). He was sentenced to three years imprisonment (R. 107). On appeal (R. 109), the judgment was unanimously affirmed (Pet. App. B, 31).

Although not denying that there was basis in fact for denial of his claim to ministerial exemption, petitioner defended the prosecution on the ground that procedural errors with respect to such claim vitiated his ultimate classification as a conscientious objector (R. 45). The pertinent facts with respect to his contentions may be summarized as follows:

1. In his Selective Service classification questionnaire, filed on May 16, 1949, petitioner stated that he had been a minister of Jehovah's Witnesses since August 24, 1940 (R. 53). At the same time he indicated that he was working an average of forty-four hours per week as a stenographer-clerk for a railway company and that he had been working in such capacity for three and one-half years. On May 23, 1949, the local board received a Special Form for Conscien-

tious Objectors from the petitioner (Gov. App. 1a)[2] which indicated, *inter alia,* that Kenneth B. Reed, Company Servant of the Huntington Company of Jehovah's Witnesses, was the leader of his church, congregation or meeting (Gov. App. 2a). On May 24, 1949, the petitioner was classified as a conscientious objector and appealed from the denial of his ministerial claim (R. 58). He was continued in the conscientious objector classification by the appeal board (R. 58). Subsequently he was placed in Class III–A, with a dependency deferment, but on October 1, 1951, was reclassified I–O as a conscientious objector (R. 58).

On October 16, 1951, the petitioner submitted a supplementary information sheet in which he continued to list his occupation as a stenographer-clerk, then earning $275 per month. He further stated: "Also ordained minister; Note, I spend evenings and weekends in ministry work" (Gov. App. 2a). He was granted a personal appearance before his local board and on October 29, 1951, was continued in Class I–O (R. 58). The summary of the hearing prepared by the local board indicates that petitioner stated he did not have a church of his own but did other types of work such as passing out literature and teaching. He said at that time that all the members of his church were ministers of the Gospel. The petitioner asked to read from Supreme Court decisions but was advised that other registrants were waiting to make personal appearances. He was told that he had the right to

[2] Gov. App. refers to the Government's Appendix filed in the court below.

appeal. When petitioner expressed the opinion that the board was prejudiced against Jehovah's Witnesses, the board informed him that they were not prejudiced but that, according to their interpretation of the Selective Service laws, a IV–D classification was for a minister who preached for a church as their minister and received pay for his services or who was in a recognized school preparing for the ministry (R. 69–70).

Prior to his appearance before the local board, petitioner wrote a lengthy letter to the board in which he cited regulations and court decisions (R. 66, 105). In appealing the local board classification, he also wrote a lengthy letter in which he cited the judicial decisions and Opinion No. 14 of the Director of Selective Service which he had attempted to read to the local board at the time of his personal appearance (Gov. App. 3a through 13a).

The appeal board classified petitioner I-O, *i. e.*, conscientious objector (R. 58). Thereafter, the Director of Selective Service appealed the case to the National Selective Service Appeal Board which, on June 25, 1952, again classified the petitioner in Class I-O (R. 58).

On July 22, 1952, in conferences with relation to his work assignment as a conscientious objector, petitioner said that he was "an assistant presiding minister" (Gov. App. 14a) and on December 10, 1952, in an appearance before the Board with reference to his work assignment, he stated that he was still employed five days a week by the railway company and was being paid $14.55 per day (Gov. App. 15a).

2. At the time of petitioner's personal appearance, there was no list of advisors to registrants posted on the walls of the local board. The trial court found that advisors had been appointed and a list of advisors was available and on the desk of the clerk (R. 36, 105). It also found that the petitioner was aware of the regulation with respect to such posting and the information was readily available to him through a simple request which he did not make (R. 36, 105). Petitioner admitted at the time of trial that he did not check for a list of advisors until May 20, 1955, about three and one-half years after his hearing, and after the Selective Service processing had been completed (R. 13). Upon inquiry at that time, the local board clerk provided him with a list of advisors (R. 13).

ARGUMENT

1. In this Court, as in the courts below, petitioner admits that there was basis in fact for denial of his claim to ministerial exemption (Pet. 12, 16). He argues, however (Pet. 11, 17), that the error of the local board in stating that the statute required a person to be paid for his services to be a minister made it unnecessary for petitioner to obey the order to report for civilian work as a conscientious objector, a classification which he was properly given by both the Appeal Board and the National Selective Service Appeal Board. This argument is manifestly unsound. On such reasoning, the value of the whole appeal procedure of the Selective Service System would be emasculated since no error by a local board could be deemed corrected on appeal if the appeal board reached the

same result as the local board. There may, of course, be errors at the local board level which permeate the entire proceedings and thus affect the ultimate classification, as where material information is not placed in the registrant's file so that it never becomes available to the appeal board.[3] That is not the situation here. Here, as the courts below found (Pet. 27, 51), all the pertinent information presented by the petitioner was before the appeal boards. There is no claim that the legal error of the local board influenced or was adopted by the appeal boards.

Under the Selective Service regulations the Appeal Board and the National Selective Service Appeal Board (for the President) each makes a *de novo* classification of a registrant on the basis of the record before it (32 CFR 1626.26 (a); 50 U. S. C. App. 460 (b) (3)). The order of the local board that petitioner work at the Weston State Hospital was not based on his classification by the local board but on his classification by the National Selective Service

[3] Such was the situation in the cases on which petitioner relies. (Pet. 11.) In *United States* v. *Zieber*, 161 F. 2d 90 (C. A. 3), the Appeal Board was deprived of a complete file by the refusal of the local board to include evidence bearing upon the classification. In *Knox* v. *United States*, 200 F. 2d 398 (C. A. 9), the local board did not consider the evidence before it and the court found that this procedural irregularity affected the Appeal Board. In *Franks* v. *United States*, 216 F. 2d 266 (C. A. 9), the local board failed even to *consider* the registrant for a I-A-O classification. In *Mintz* v. *Howlett*, 207 F. 2d 758 (C. A. 2), not only was the hearing found to be inadequately directed to the issue of fact involved and the record too meager (pp. 760–761) but the ultimate classification was deemed erroneous.

before it (which was full and complete), classified petitioner as a conscientious objector, a classification which petitioner concedes has a basis in fact. This classification was made without error, is valid, and is not subject to attack.

The Court has already held that an erroneous interpretation of the law by a lower board is harmless if the final order rests on a determination by an appellate authority. *Bowles* v. *United States,* 319 U. S. 33. That case, which is not cited in the petition for certiorari, would seem to be controlling. There the registrant, who had been ultimately classified by the Director of the Selective Service System on appeal to the President, attacked as erroneous an interpretation of the conscientious objector statute made by the appeal board in rejecting his claim. This Court said:

> Before the local draft board issued its order to petitioner, the appeal board's determination which he assails here, had been superseded by the action taken by the Director on the final appeal to the President. Hence the order rests on the Director's controlling determination of fact, adverse to petitioner's claim of conscientious objection to military service, and not on the alleged erroneous interpretation of the Act which petitioner urges as a defense in the present criminal proceeding [319 U. S. at 35–36].

See also *Eagles* v. *Samuels,* 329 U. S. 304, 312; *Witmer* v. *United States,* 348 U. S. 375, holding that non-prejudicial errors may be disregarded. In *Tomlinson* v. *United States,* 216 F. 2d 12 (C. A. 9),

certiorari denied, 348 U. S. 970, where, as in this case, the appellant did not argue that the denial of his claims for ministerial status was without basis in fact but rather that he was denied a full and fair hearing because the board indicated that it felt a minister is one who is "ordained", the court held that the errors of the local board were cured by Appeal Board review and reclassification.

2. With respect to the posting of the names of advisors, the trial court found as a fact that the petitioner was aware of the regulation with respect to posting names of advisors and that the information as to the names of the advisors was readily available to him (R. 105). Petitioner admittedly did not seek to obtain the names until after his classification had been completed (R. 13). The Courts of Appeals have uniformily held that the failure to post names of advisors in the local board office is not a denial of due process unless there is a showing that the registrant was prejudiced. *Rowton* v. *United States,* 229 F. 2d 421 (C. A. 6), certiorari denied, 351 U. S. 930; *Uffelman* v. *United States,* 230 F. 2d 297 (C. A. 9); *Kaline* v. *United States,* 235 F. 2d 54 (C. A. 9); *United States* v. *Manns,* 232 F. 2d 709 (C. A. 7); *United States* v. *Mekolichick,* 234 F. 2d 71 (C. A. 3), certiorari denied, 352 U. S. 908. Petitioner's speculation that he could have been prejudiced because he might have prepared better papers with help (Pet. 20–22) is irrelevant since he did not seek help although he knew that advisors were available. As pointed out by the trial court, he pursued his rights of appeal through the Appeal Board and to the high-

est administrative body, the National Selective Service Appeal Board (R. 58). He placed in his file all the information he had with respect to his claim for exemption (R. 66, 105, Gov. App. 3a through 13a). There is no showing that having the list of advisors on the clerk's desk rather than on the wall in any way prejudiced petitioner.

In view of the change in regulations making the appointment of advisors discretionary rather than mandatory (see footnote 1, *supra,* p. 4), the problem has no continuing importance.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1956.

U. S. GOVERNMENT PRINTING OFFICE : 1956

Office - Supreme Court, U.S.
FILED
DEC 31 1956
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1956

No. 604

JACK RONALD CAPEHART, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner's Supplemental Memorandum Supporting Petition for Writ of Certiorari

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MAY IT PLEASE THE COURT:

Since the preparation and filing of the petition for writ of certiorari in this case the United States Court of Appeals for the First Circuit has rendered a decision in *Steele* v. *United States*, No. 5137, December 21, 1956, which is in conflict with *Rowton* v. *United States*, 229 F. 2d 421 (6th Cir. 1956); cert. denied, 351 U. S. 930 (1956); *United States* v. *Manns*, 232 F. 2d 709 (7th Cir. 1956); and *United States* v. *Mekolichick*, 234 F. 2d 71 (3rd Cir. 1956); cert. denied No. 405, Nov. 13, 1956. (See the petition for writ of certiorari at page 22.)

This conflict between the Court of Appeals for the First Circuit and the decision by the court below in this case, as well as with the decisions just mentioned, gives jurisdiction to this Court to grant the writ of certiorari under point III of the petition. (See pages 17-25.)

CONCLUSION

WHEREFORE the Court is respectfully requested to grant the petition for writ of certiorari.

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VICTOR F. SCHMIDT

Counsel for Petitioner

December, 1956

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 604

JACK RONALD CAPEHART, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

By supplemental memorandum petitioner has called the Court's attention to the decision of the Court of Appeals for the First Circuit in *Steele* v. *United States,* No. 5137, decided December 21, 1956, which he alleges to be in conflict with the decision below in this case. In our view, *Steele* v. *United States* is not in conflict with the ruling below and that decision should not impel the Court to grant the petition in this case.

As one ground for review by this Court, petitioner Capehart alleges that his conviction for refusing to work as a conscientious objector should be set aside because the list of advisors to registrants was on the

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clerk's desk, rather than being "conspicuously posted" as required by the regulations as they then existed. There was no showing that Capehart had in any way been prejudiced by this fact. On the contrary, the court found that he had presented all the relevant facts, had taken his case through the highest appeal board, and that there was no indication of how his position could have been bettered through advice. Further, the court found that Capehart knew of the requirement of posting the list of advisors and could have seen the list by asking the clerk about it.

The facts in the *Steele* case are completely different. Steele was entitled to a dependency deferment but failed to file proof of this fact within the time required by the regulations. No one told Steele of the regulations setting the deadline for filing such proof. When Steele pressed his claim for dependency deferment, he was told that his claim was not timely. It appeared that the Local Board had never appointed advisors for the registrants.

The Court of Appeals for the First Circuit followed the same legal standard adopted by other courts and held that there must not only be a failure to comply with the regulations but it "must be coupled with prejudice to the appellant" before a conviction could be reversed. The court then went on to decide that "the evidence, as we read it, indicates a reasonable possibility, if not probability, of prejudice to the defendant-appellant * * *." In view of the fact that Steele would have been deferred if he had filed timely proof of his dependency status and that no one advised him of the regulations establishing the deadline, the

decision of the court is certainly understandable. But whether it is correct or not, it in no way conflicts with the decision below where there was no indication of any way in which petitioner was prejudiced by the placing of the list of advisors on the clerk's desk rather than posting it conspicuously.

CONCLUSION

For these reasons and those set forth in the brief in opposition, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

JANUARY 1957.

U. S. GOVERNMENT PRINTING OFFICE, 1957